

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP #19- 1977:

MONTANA EDUCATION ASSOCIATION,

Complainant,

-VS-

SCHOOL DISTRICT #87, ROCKY BOY
ROUTE, BOX ELDER, MONTANA,

Defendant.

FINAL ORDER

.....

A Proposed Order was issued in the above-entitled matter by Rick D'Booge, Hearing Examiner, on March 10, 1978. Exceptions to the Proposed Order were submitted on April 5, 1978 by the defendant.

Oral argument was heard on the matter before the Board of Personnel Appeals on May 2, 1978. After reviewing the record and considering the briefs, the Board makes the following Order:

1. IT IS ORDERED that the Exceptions to the Order are denied.

2. IT IS ORDERED, the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Examiner are hereby adopted as the Final Order of this Board.

Dated this 17th day of July, 1978.

BOARD OF PERSONNEL APPEALS

By Brent Cronley
Brent Cronley,
Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP #1977:
MONTANA EDUCATION ASSOCIATION,

Complainant,

-vs-

PROPOSED ORDER

SCHOOL DISTRICT #87 ROCKY BOY
ROUTE, BOX ELDER, MONTANA

Defendant.

I. INTRODUCTION

The question before Rick D'Hooge, Hearings Examiner for the Board of Personnel Appeals, in Unfair Labor Practice #1977 is whether or not Carolyn Velk's and/or Charles Nau's contracts were not renewed by Rocky Boy School District #87 because of their concerted union activities as defined in Title 59, Chapter 16, R.C.M., 1947. A hearing in the above entitled matter was held at the Administration Building of the school district on September 20, 1977.

I wish to divide this unfair labor practice into the major areas of findings of fact, discussion, conclusion of law, remedies, and proposed order. The findings of fact will be divided into the areas of general findings, Velk findings, and Nau findings.

Because the Board of Personnel Appeals has very little case history, I will be citing a few federal statutes and cases for guidance in the application of Montana's collective bargaining act, Title 59, Chapter 16, R.C.M. 1947 (ACT). The Montana Supreme Court in State Department of Highways vs Public Employees Craft Council, 165 Mont. 249, 529 P 2d 785 at 787 (1974) approved this principal by these citings:

"When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes."

1 [Citing cases] Although the cases which have interpreted the
2 italicized words involved private employees, the act before us
3 incorporates the exact language, consisting of 16 words, found
4 in the earlier statutes, and it is unlikely that the same
5 words would have been repeated without any qualification in a
6 later statute in the absence of an intent that they be given
7 the construction previously adopted by the courts.

8 "We think similar standards of judicial construction apply in
9 the present case. For example, section 19-102, R.C.M., 1947,
10 provides:

11 "Words and phrases used in the codes or other statutes of
12 Montana are construed according to the context and the
13 approved usage of the language; but technical words and
14 phrases, and such others as have acquired a peculiar and
15 appropriate meaning in law, or are defined in the succeeding
16 section, as amended, are to be construed according to such
17 peculiar and appropriate meaning or definition." (Emphasis
18 added).

19 After a thorough review of the briefs, exhibits, conflicting
20 testimony and the demeanor of the witnesses, I set forth the
21 following:

22 II. FINDINGS OF FACT

23 A. General

24 1. The Hearings Examiner is taking Administrative note of ULP
25 #13-76, Rocky Boy Education Association (RBEA) vs Rocky Boy School
26 District #87, as requested by MEA. Tr120. RBEA...

27 "...has charged that Defendant has interfered with the admin-
28 istration of a labor organization, has discriminated in regard
29 to tenure of employment to discourage membership in a labor
30 organization, and has refused to bargain collectively in good
31 faith with Complainant." ULP #1376, Recommended Order, Page 1,
32 Lines 1216, December 14, 1976.

33 2. There is no Master Labor Agreement governing school admin-
34 istration/teachers relationships for the 1976-77 school year. The
35 RBEA was trying to negotiate a retroactive contract for the 1976-77
36 school year. There is no contract at Rocky Boy for the 1977-78
37 school year. Tr5,24.

38 3. On February 7, 1977, Charles Nau, RBEA's Chief Negotiator
39 (Tr23,42,62), contacted Harold Gray, the School Board's chief
40 negotiator (Tr31,42,104), to arrange the first negotiation meeting.

41 4. Carolyn Velk, Bob Veithenheimer, Helen Ford, Charles Nau,
42 and Mark Poor, teachers, (Tr43) met with Harold Gray, Dorothy Small

1 and Alfred Nault, School Board representatives, to consider negoti-
2 ating a Master Agreement. At the February 8, 1977 meeting, Mr.
3 Gray told RBEA that the School District was under no obligation to
4 negotiate because decision in ULP #1376 was being appealed. Gray
5 also added that the School Board would negotiate if RBEA (a) dropped
6 MEA affiliation, or (b) formed a different type of teachers organiza-
7 tion, or (c) dropped the evaluation charges in ULP #13-76. If RBEA
8 dropped ULP #13-76, RBEA was to advise the Board of Personnel
9 Appeals of such and write a letter of apology to the School Board
10 for filing the the charges. Tr43,44.

11 5. During class on February 9, 1977, Alfred Nault appeared at
12 the classroom of Mr. Nau and requested that he sign a copy of the
13 "minutes" for the meeting of February 8, 1977. Tr45. Mr. Nau
14 complained about the "minutes" because they demonstrated only one
15 side of the meeting. Mr. Nault quickly smoothed over Mr. Nau's
16 complaint. Mr. Nau made some changes in the "minutes" and signed
17 them. Tr47. Mr. Nault did not leave a copy of the "minutes" with
18 Mr. Nau. Tr48. During class, Mr. Nault made the same request of
19 Ms. Volk. Tr30.

20 6. On February 10, 1977, Pat Scott, a secretary, informed Nau
21 of a news article being produced from the "minutes" of the February
22 8, 1977 meeting. Tr46,64.

23 7. In the lunchroom on February 11, 1977, Volk, Nau and
24 Dorothy Small had a few sharp words over the proposed news article.
25 Dorothy Small, Vice Chairman of the School Board, is attributed
26 with saying..."if we would have withdrawn our evaluation charges...
27 there wouldn't be a lot of problem" and if you do not..."we'll
28 continue to fight you...and...we have the money to fight you all
29 the way to the Supreme Court, if necessary." Tr48(1724).

30 Later, Superintendent Crain called Nau to have a meeting with
31 Small and himself. Nau reviewed the proposed news article and
32

1 commented that it was untrue, libelous and slanderous. Tr46, 48,
2 49, 65. Crain and Nau then had a meeting with Velk concerning the
3 proposed news article. Tr64.

4 8. On February 13, 1977, Gray had a few beers with Nau, Velk
5 and _____. Nau told Gray why they were so discontented with
6 the proposed news article. Tr46.

7 9. On February 14, 1977, Gray appeared at an MEA meeting and
8 assured them there would be no news article. Tr49. That evening,
9 The Havre Daily News carried a news article which was highly critical
10 of the Montana Education Association's (MEA) staff, attorneys and
11 RBEA's past president, Richard Leetang. MEA Exhibit #1 states in
12 part:

13 "...ROCKY BOY--Five teachers at the Rocky Boy School have
14 complained of failure of those hired to represent them in a
15 disagreement with the school trustees to provide them access
16 to legal documents pertinent to the case.

17 "...Gray since has written Mrs. Loring supplying her with a
18 copy of the official minutes of the February 9 meeting which
19 the five signed. He said: 'This meeting last night resulted
20 because the teachers who are members of RBEA want to negotiate
21 a new contract for the coming year.' We would like to nego-
22 tiate but are reluctant because of their lack of information
23 as to the nature of the unfair labor charges your office and
24 the State MEA office filed against the Rocky Boy School..."

25 10. Before February 17, 1977, Nau, Velk, Viethenheimer and
26 Ford, RBEA's Negotiations Committee, met with Sean Matthews, MEA
27 Uniserve Director, to draft a letter to the Editor in reply to the
28 news article of February 14, 1977. Tr7,49,101. The letter to the
29 Editor was highly critical of the School Board and stated in part:

30 "...With regard to Harold E. Gray's statement 'we would
31 like to negotiate a new contract for the coming year...' Gray
32 actually said that the board would not negotiate with us unless the teachers did one of the following:
33 1. Withdraw from M.E.A. and form a new group for the
34 teachers. 2. Negotiate separately with individual
35 teachers for contracts. 3. Have the R.B.E.A. contact
36 Mr. Jerry Painter and withdraw the unfair labor practice
37 charge on evaluation and send the board of Trustees a
38 letter of apology.

39 "...It was also stated that if the teachers did not
40 choose one of the above the board would continue
41 fighting this charge all the way to the Supreme Court

1 if necessary. This is an interesting point as Dorothy Snall,
2 Vice Chairman, stated: 'That they have the kind of money
3 necessary to fight the Rocky Boy teachers to the Supreme
4 Court.' At Rocky Boy we have insufficient supplies to provide
5 for the proper education of the students.

6 "What has hapened to the hundreds of thousands of dollars
7 granted by the taxpayers of this state and country for the
8 school when our students neither have the paper to write on
9 nor the pencils to write with had they had the paper..." MEA
10 Exhibit #2.

11 11. Gray went into Nau's classroom on February 10, 1977,
12 raising cane and wondering "...where we got off putting such news-
13 paper articles in the paper..." Tr50 (11-15). The same day Volk
14 wrote a letter to Leona Mitchell, School Board Chairman, which
15 states in part:

16 "...Please be advised that Mr. Harold Gray has repeatedly
17 burst into classrooms while your teachers were trying to
18 teach, interrupted classes, and demanded information on
19 association matters. This type of outburst is extremely
20 detrimental to the students and the educational process here
21 at Rocky Boy. We also understand that it is in violation of
22 at least two state statutes..." MEA Exhibit #4.

23 A short meeting, called by Gray to discuss the newspaper
24 article, was held between Volk, Viethenheimer, Ford, Nau, Matthews
25 and Mitchel, Crain, and others. MEA Exhibit #5. The meeting ended
26 abruptly when Gray tried to accuse the teachers with calling the
27 meeting and leaving the classrooms. Tr\$1,52,67.

28 On February 18, 1977, Gray wrote to RBEA's negotiating commit-
29 tee (Volk, Nau, Viethenheimer, Ford) which states in part:

30 "...On February 8, 1977 I told you in the presence of Dorothy
31 Small and Alfred Nault that because of charges against us we
32 were under no obligation to negotiate, and, that because you
33 were all members of MEA we could not negotiate separately
34 because MEA had been recognized as the exclusive bargaining
35 agent. We were therefore bound to negotiate with MEA.

36 The other things I told you I clearly stated as being your
37 choice. Specifically that because you as a group of teachers
38 wanting to get negotiations under way you could choose to join
39 another union, drop the charges, or choose to negotiate as
40 individuals and not as members of any bargaining unit. These
41 were my suggestions as the way out of the difficulty as we
42 viewed it at that time. Therefore, I must vigorously disagree
43 with you when you put in the paper: ..." MEA Exhibit #3.

1 12. A negotiating meeting was to take place on February 28,
2 1977. At the begining of the meeting, Gray told the RBEA that they
3 would not negotiate because of the ULP and the new Tribal Resolution,
4 Tr32,54,68,85,86. The Tribal Resolution reads in part:

5 "...WHEREAS, the ChippewaCree Tribal Business Committee has
6 heard and duly considered the evidence that the Montana
7 Education Association and its affiliate the Rocky Boy
8 Education Association have and continue to denigrate the good
9 name and effort of the Rocky Boy School, its Board of Trustees
10 and Administrators; and,

11 "WHEREAS, the ChippewaCree Tribal Business Committee considers
12 these acts of denigration to be a clear and blatant attempt to
13 subvert the right of Tribal members to control the quality of
14 education for their children, and, as a challenge of our
15 peoples right to make laws and be ruled by them according to
16 our customs and beliefs; and,

17 "WHEREAS, the ChippewaCree Tribal Business Committee now
18 chooses to exercise its power as it pertains to Trade and
19 Teacher Unions operating on our Reservation.

20 "NOW THEREFORE BE IT RESOLVED, that all trade and teacher
21 unions are prohibited from operating on the Rocky Boy's
22 Reservation until such time as Tribal Laws are enacted
23 governing their activities; and,

24 "BE IT FURTHER RESOLVED, that this decision is not to be
25 construed as prohibiting the rights of Tribal Members and
26 others to meet and ask for pay raises, fringe benefits, sick
27 leave, vacation time, health and accident insurance, and,

28 "BE IT FURTHER RESOLVED, that Montana Laws as they pertain to
29 trade and Teacher Unions are hereby declared null and void,
30 but in so doing we declare our willingness to meet with
31 officials of Montana State Government to work out matters of
32 mutual concern and benefit to all people..." MEA Exhibit #14.

33 13. On March 14, 1977, a meeting was held between Sean
34 Matthews, Charles Nau, Bob Viethenhainer, Carolyn Velk, and School
35 Board representatives Dorothy Small, Allen Grain, Harold Gray,
36 Walter "Moose" Denny, Mr. Sangry, Alfred Nault, Lydia Sutherland
37 concerning the questions that were asked by the RBEA in the
38 newspaper. MEA Exhibit #9; Tr15,69. The School Board made a
39 motion to bar Sean Matthews from the meeting. The motion passed.
40 Mr. Matthews was asked to leave or the School Board would call the
41 Tribal Police to remove him from the meeting. The teachers argued
42 that if this was a School Board/Teachers meeting only, then Mr.
43 Gray should also leave. Gray and Matthews left the meeting.

Tr15,56,84,85,89,90. During the meeting, Mr. Crain questioned the teachers about the first two questions in MEA Exhibit #6 (Tr16,30,30) which states in part:

"TO: Carolyn Velk, Bob Vietenheimer, Helen Ford,
Charles Nau
FROM: Leona Mitchell, Chairperson, Rocky Boy School
Board
SUBJECT: Questions Listed Below

We are very concerned about the letter to the editor which was published in the Havre Daily News on February 17, 1977. It is our concern that you have unjustly attacked the Rocky Boy School system without just and proper cause. We would appreciate your response to these questions by 5:00 p.m. today, February 28th.

1. Why did you choose to question the spending of hundreds of thousands of dollars of Montana taxpayers and U.S. taxpayers money in your February 17th letter to the editor of Havre Daily News?
2. Why didn't you ask the school board for audits or financial reports covering the expenditure of public money, if you were so concerned?..."

Mr. Denny, School Board member, was reported as asking the teachers why they wanted MEA. Tr16,17,33,103. The Record sets forth the following in part:

"RICE [School Board's Attorney]: Okay. At the time of that meeting, were there any, uh, negative comments or criticisms made of the MEA involvement in this matter or you involvement with them?
NAU: They [The School Board] were interested, at that time, why we [the teachers, RBBA] wanted Sean out here and, they were also interested at that time why we were affiliated with MEA and why we needed them. They felt that there should be a common trust and, you be good to us, we'll be good to you type of feeling among, you know, between the two parties and, uh, et cetera, you know." Tr70 (12-20).

Lydia Sutherland is generally attributed with initiating a School Board Policy of limiting the freedom of the press. Tr20, 34,117,118. The Policy is in part:

"DENNY: ...We [The School Board] don't know about them [Letter to the Editor, News Releases] until we see them in the paper so we discussed it and we made it a policy that any correspondence or news articles that were to appear in the paper were to have approval of the School Board prior to going out..." Tr112 (19-26).

1 14. On April 1, 1977, Velk and Nau tried to continue negoti-
2 ations by writing a letter to Mr. Gray which states:

3 "April 1, 1977

4 To: Harold Gray and Negotiating Team
5 From: R.B.E.A. Negotiating Team
6 Subject: Negotiations--April 6th and 7th.

7 Due to prior commitments of the R.B.E.A. Negotiating Team on
8 April 7th, we will be unable to meet to negotiate on that day. We
9 will be glad, however, to negotiate on April 5th and 6th at 7:00
10 p.m. in the administration building.

11 S/_____
12 President of R.B.E.A.

13 S/_____
14 Chief Negotiator

15 Carolyn & Charlie:

16 I am confused as to who we are to negotiate with so I've
17 referred this matter to Supt. Crain for clarification. I don't
18 know what to do in view of Tribal Resolution #14-77.

19 S/signed in Cree by Harold Gray

20 4/6/77
21 11:30 a.m."

22 MEA Exhibit #20.

23 15. The School Board met on April 12, 1977 and voted not to
24 offer a new contract to Velk, Nau and others for the next school
25 year. The School Board's minutes for April 12, 1977, state in part:

26 "Present: School Board members Sharon Watson, Lydia
27 Sutherland, Minnie Watson, Walter Denny,
28 Others Dennis LeVeque, Leon Stansfield,
29 John Mitchell, Ivan Raining Bird, Duane
30 Jeanette, Dog Rehder, and Sylvia Ryan.

31 "...Lydia Sutherland moved that Walter Denny be chairman of
32 the School Board. Sharon Watson seconded the motion. Motion
33 carried.

34 "...Minnie Watson requested to withdraw from the negotiation
35 team.

36 "...Lydia Sutherland made a motion to send a letter of non-
37 renewal to Carolyn Velk. Minnie Watson seconded the motion.
38 Motion carried.

39 "Walter Denny made a motion to send letter of non-renewal to
40 Charles Nau. Sharon Watson seconded the motion. Motion
41 carried.

1 "...Sharon Watson recommended to go along with Harold Gray's
2 request to be removed as chief negotiator.

3 "Lydia Sutherland made a motion to send a letter to each one
4 of the Indian certified teachers to set up a meeting with the
5 School Board for negotiations. Sharon Watson seconded the
6 motion. Motion carried..." District #87 Exhibit #B.

7 A letter from the School Board to the Indian teachers was sent
8 in which the School Board requested the Indian teachers to negotiate.
9 Tr22,36.

10 16. Before April 26, 1977, Velk and Nau requested the reasons
11 for nonrenewal of their contracts. The School Board's letters in
12 reply state in part:

13 "...This is in reference to your letter of April 13, 1977,
14 which was received on Friday, April 27, 1977, requesting that
15 the School Board of District #87 Rocky Boys' Reservation state
16 reasons of non-renewal of your teaching contract for school
17 year 1977 and 1978.

18 "The School Board has reviewed your past services, and has
19 determined that it would prefer to consider, for this position,
20 other candidates.

21 Sincerely,

22 S/
23 Walter Ray Denny
24 School Board Trustees"

25 MEA Exhibit #15, 18.

26 17. When Mr. Stansfield, Principal, was asked for the reasons
27 for nonrenewal of Velk's and Nau's contracts, the Record sets
28 forth the following in part:

29 "LORING [MEA's Attorney]: Do you recall any discussion on the
30 part of the Board as to the reasons for nonrenewal? Normally
31 these decisions, there are a lot of factors involved as we all
32 know, and whether a teacher is satisfactory or not; but, uh,
33 do you recall any discussion of areas where they may have been
34 lacking?

35 STANSFIELD: Yes, I do.

36 LORING: Uh, would you explain to us where the School Board
37 felt that there were problems:

38 STANSFIELD: Uh, I don't feel at liberty to divulge the things
39 that were, uh, discussed by the Board unless I'm required to
40 by the Hearings Examiner.

41 D'BOOGE: In order for a Hearings Examiner to rule on this
42 type of matter, we would like as complete a record possible. I
43 do not know the ins and outs of requiring you to answer it.
44 Would counsel wish to say anything about it?

45 LORING: Uh, I've called him as an adverse witness and I
46 suggest that the School District's counsel address the matter.

47 RICE: I guess the only thing I can say about it is that I

1 think that Mr. Crain is wondering whether he can probably
2 fairly represent what was in the minds or thoughts of the
School Board.

3 LORING: I asked - I'm not asking what was in
the minds or thoughts. I'm asking what was said.

4 RICE: Okay. I guess then basically he would probably - I
5 think what we have is a conflict here probably between the,
uh, Section 75-6105.1, which allows a non-tenured teacher to
6 request a statement of reasons for non-renewal, as opposed to
this matter which deals with the question of whether or not
7 they were dismissed for union activities; and so it becomes a
question of the School Board being required to, uh, defend
8 their action and, of course, state reasons which, uh, would
possibly or I assume by the petitioners, not substantiate the
9 non-renewal which actually is not required under the non-
tenured teacher statute. Just that my comment is that, you
10 know, there is no need for reasons as such for dismissal
although there is a request that statement can be made. And
11 so, I have no particular feelings about this. I don't think
that Mr. Stansfield is going to, uh, indicate anything other
than what he heard at that time and Board members themselves
12 will probably come to indicate what they said also. And so, I
have no strong objection to his making those comments as long
as the Hearing Examiner appreciates our feelings about that
13 which I think will be probably some substance of our brief in
response in this matter anyway.

14 D'HOOGHE: What was the statute section?

15 RICE: 75-6501.1, sub 2 in parenthesis, R.C.M. 1947.

16 D'HOOGHE: We basically, I am of the feeling that, uh, in order
for me to adequately weigh this case, I can only do it if I
17 have a complete record. Uh, then I would request that you
answer it as you see fit.

18 STANSFIELD: Well, my feeling is, I'm willing to discuss, you
know, uh, I don't, I'm not intending to hide anything that
would have a material effect on the case but at the same time
19 I don't wish to implicate the Board in anything that they
might have discussed at that meeting which could lead to some
20 further complication of this matter. Uh, I could answer the
question as far as their discussing, uh, the teacher's associ-
ation activities and that was that there was absolutely nothing
21 said about their association activities at that meeting.

22 LORING: Was anything said about the article in the paper?

23 STANSFIELD: I don't recall that either. I don't recall
anything that was discussed about those matters which are
24 really the substance of the case." Tr76 Line 19 to Tr78 Line
25 25.

26 When Mr. Denny was asked for the reasons for nonrenewal of
27 contracts, he states the following in part:

28 "RICE: And were your reasons other than any involvement [sic]
they had with the MEA or this newspaper matter or whatever
occurred before?

29 DENNY: Yes, uhuh.

30 RICE: And did you feel that, as a board member, they were
valid reasons?

31 DENNY: Yes." Tr105(13-18). And,

32 "LORING: Have, uh, have you ever visited Mr. Volk's, uh, Mr.
Nau's classroom?

DENNY: No.

LORING: At the School Board meeting, did the, uh, the meeting

1 of April 12th, did the School Board members review the eval-
uation that, uh, had been made?

2 DENNY: Yes, I'm sure they did that.

3 LORING: Did you, uh, both, the evaluations of both of these
people, the principal recommended, uh, that they be, uh, their
contracts be renewed, was there a discussion at the School
4 Board meeting of why you decided not to accept his resign or
his recommendations?

5 DENNY: Yes, there were.

6 LORING: You made the motion to not renew Mr. Nau. Uh, barely
a month earlier you hadn't even known who he was, and you'd
never visited his classroom, what was the basis on which you
made the motion to nonrenew?

7 RICE: I'd object to that question upon the grounds that it
goes into privileged matters which I think by School Board law
are not to be dealt with in this matter, in this hearing.

8 There's no duty upon the School Board to divulge those matters
other than that the statement was submitted, which it was; and
the law does not require details as to nonrenewed teachers
renewal or nonrenewal.

9 LORING: I think it's very relevant to this proceeding."

10 Tr108, line 22 to Tr109, line 6.

11 "...D'BOOGE: Back on the record. I believe that the question
is in order since it was not an executive session and if there
is major objections to it, I'd like to see that point briefed
in the briefs.

12 LORING: Uh, Mr. Denny, my question was, you made the motion
to not renew Mr. Nau. Yet, a month before you hadn't visited
his classroom. What was the basis for your motion not to
renew?

13 DENNY: I guess the only thing that we discussed at this
particular meeting was the School Board felt and I felt, went
along with their feelings, is that they wanted to review other
applicants for this particular position. And that's on that
basis that I made my motion on it." Tr111 line 26 to Tr112
line 11.

14 18. The School Board requested either a retraction of the
15 letter to the editor or the evidence in support of it. NEA
16 Exhibits #6,7, 8,10,12.

17 19. NEA Exhibit #22 is a letter from Sean Matthews to Mr.
18 Grain requesting a copy of the School's budget. Mr. Matthews had
19 repeatedly requested the budgetary information and received no
20 reply. Tr92,83.

21 8. Velk Findings

22 1. Velk was a first grade teacher at Rocky Boy School District
23 #87 for the school years of 1975-76 and 1976-77. Tr2,3,25.

24 2. Velk has a Bachelor of Arts degree from Northern Montana
25 College and is certified to teach kindergarten through the eighth
26 grade. Rocky Boy School was her first employment as a teacher.

27 Tr3.

1 3. For the 1976-77 school year, Velk was president of RBEA.
2 Because of the prior experience of Richard Leetang, former president
3 of RBEA, Velk did not want the presidency of RBEA. Velk informed
4 Mr. Crain that if she accepted the presidency, she would lose her
5 job at the end of the school year. Tr4,26. A letter written to
6 Velk by Leona Mitchell, School Board Chairman, and Dorothy Small,
7 School Board Vice Chairman, states the following in part:

8 "February 28, 1977

9 "...
10 1. Do you speak for yourself or are you speaking for all
11 teachers at the school? Please specify who you represent?

12 "...
13 2. Verbal reports have reached us that you are making
14 comments to the effect that you and other MEA negoti-
15 ators will be fired at the end of the year because of
16 your union activities. Are you making such comments?
17 If so, why have you reached this conclusion?..."
18 MEA Exhibit #5.

19 4. Velk was a member of the RBEA's negotiating team both
20 years of her employment. The first year, Velk only kept the notes
21 for the negotiating team. Tr5,27.

22 5. Velk was one of the authors and signed the letter to the
23 Editor. MEA Exhibit 2, Tr7.

24 6. Mr. Stansfield, Principal, talked to Velk about a different
25 labor organization called National Association of Professional
26 Educators (NAPE). Tr14,75,92. NAPE is a labor organization which
27 operates on the principles of employment benefits being gained by
28 individualized merits not collective merits such as MEA. Tr72,67.
29 Stansfield also talked to Velk about individual bargaining and
30 being paid on individual merits. Tr115,116.

31 7. Velk was evaluated by Mr. Stansfield on December 9, 1976
32 and on March 10, 1977. The evaluations were reviewed by the School
Board on April 12, 1977 before they make their decision not to
renew Velk's contract. Tr98,103. The evaluations reflect the
following in part:

Ratings	December 9, 1976	March 10, 1977
	Number of Items Rated	Number of Items Rated
Poor	0	6
Fair	0	0
Average	0	3
Good	8	21
Excellent	70	46

Some of the items and the comments on those items:

December 9, 1976: None

March 10, 1977:

...

JOB RESPONSIBILITY ATTRIBUTES:

THE TEACHER EXHIBITS THE FOLLOWING RESPONSIBILITY ATTRIBUTES:

...

11. Displays a willingness to volunteer for off-schooltime activities if possible, in order to alleviate the necessity of an assignment system.

...

[Comment:] 11. Carolyn took a risk when she accepted the presidency of RBEAa job no one else seemed to want and she has made some mistakes it appears, but I do not think it is her intent to hurt the school in the long run.

PERSONAL ATTRIBUTES:

THE TEACHER EXHIBITS THE FOLLOWING PERSONAL ATTRIBUTES:

...

7. Exhibits and openmindedness toward the community, local concerns, and the school:
 - a. does not make judgements without gathering, interpreting, and weighing out all the facts that are gathered from all involved
 - b. is not prejudiced in forming opinions, ideas, argument and/or judgements.
 - c. does not present a onesided view of things

...

[Comment:] 7. The letter written to the editor of The Havre Daily News and signed by Carolyn and three other teachers may not have been the best way to settle an argument. At least it was questionable because it affected negatively the image of the entire school and administration when in fact the argument was with a single individual, it is believed. However, this single mistake should not be considered as grounds for nonrenewal.

...

PROFESSIONAL ATTRIBUTES:

THE TEACHER EXHIBITS THE FOLLOWING PROFESSIONAL ATTRIBUTES:

...

4. Practices professional ethics--keeps matters private, confidential; personal or home problems should not interfere with job--See note

7. Respects the opinions of others, does not show disrespect by making negative comments--See note

13. Displays loyalty to the school and its objectives;
a. willing to defend its objectives and philosophies
b. suggestions for improvement are brought to coordinators and principal
c. does not criticize the school program or staff in the community without first knowing the information is correct, and then going through the proper channels

15. Exhibits a willingness to direct criticism to the appropriate people for the improvement of the school through these channels:

- c. superintendent
- d. school board
- e. community

[Comments:] 7 & 4 13 15c,d,e refer to PERSONAL ATTRIBUTES #7 NOTE.

Summary Comment:

March 31, 1977

Carolyn Velk is one of the hardest working teachers I have known. I will feel a measure of success with her (as a teacher under my supervision) if I am able to channel her energies and enthusiasm into the highest priority areas of teaching. Given constructive supervision and tactful consideration she could become a very productive professional. I recommend renewal of contract for the succeeding school year.

S/_____
Principal"

MEA Exhibit #13, Tr21.

8. MEA Exhibit #16 is a very good letter of recommendation, dated June 6, 1976, for Carolyn Velk from James L. Davis, former Principal of Rocky Boy School.

9. Carolyn Velk was a primary contact for Sean Matthews, MEA's Uniserv Director. Tr88,89.

10. The School Board and Velk had a good relationship before February 14, 1977. Tr27.

11. At the April 12, 1977 School Board meeting, the School Board did not discuss Velk's teaching abilities. The Record states the following in part:

"LORING: In regard to the nonrenewal of Carolyn Velk, was there and [sic] discussion, uh, other than the same thing that

1 you said about Mr. Nau that you wanted to interview other
2 people. Was there any discussion of her teaching, uh,
3 abilities or any particular problems that you had with her?
DENNY: No." Tr113(7-12)

4 12. Volk is now employed as a second and third grade teacher
5 in Big Sandy, Montana. She is currently earning \$9300 annually.
6 During the summer of 1977, Volk incurred \$1100 in moving expenses
7 from Havre to Big Sandy. Tr24.

8 C. Nau Findings

9 1. Charles Nau was a junior high school teacher at the Rocky
10 Boy School for the 197677 school year. Tr41.

11 2. Nau has a degree from Western Montana College. After
12 college, Mr. Nau taught for one year at Willow Creek, Montana, and
13 then at Rocky Boy, Montana. Tr41,42.

14 3. Nau was elected Chief Negotiator of BBEA. Nau testified
15 that he had a fear of losing his teaching job because he was Chief
16 Negotiator. Tr27,28,42,62.

17 4. Nau was one of the authors and signed the Letter to the
18 Editor. MEA Exhibit #2, Tr49.

19 5. Stansfield evaluated Nau from November 23, to December 20,
20 1977 and on March 28, 1977. The evaluations were reviewed by the
21 School Board on April 12, 1977 before they made their decision not
22 to renew Nau's contract. Tr98,100. The evaluations reflect the
23 following in part:

	November 23, 1976 to December 20, 1976	March 28, 1977
<u>Ratings</u>	<u>Number of Items Rated</u>	<u>Number of Items Rated</u>
Poor	0	3
Fair	0	0
Average	0	3
Good	2	16
Excellent	76	54

29 Some of the items and the comments to those items:

30 First Evaluation: None
31 March 28, 1977:

PERSONAL ATTRIBUTES:

THE TEACHER EXHIBITS THE FOLLOWING PERSONAL ATTRIBUTES:

7. Exhibits an openmindedness toward the community, local concerns, and the school:
 - a. does not make judgements without gathering interpreting, and weighing out all the facts that are gathered from all involved
 - b. is not prejudiced in forming opinions, ideas, arguments, and/or judgements.
 - c. does not present a onesided view of things

[Comment:] 7. This relates to a letter to the editor of The Havre Daily News which reflected negatively upon the school and its administration.

PROFESSIONAL ATTRIBUTES:

THE TEACHER EXHIBITS THE FOLLOWING PROFESSIONAL ATTRIBUTES:

4. Practices professional ethics--keeps matters private, confidential; personal or home problems should not interfere with job
7. Respects the opinions of others, does not show disrespect by making negative comments
13. Displays loyalty to the school and its objectives:
 - c. Does not criticize the school program or staff in the community without first knowing the information is correct, and then going through the proper channels

[Comment:] 4 7 13c refers to comment under 'Personal Attributes' #7. It appears that all regular channels of the school administration including grievance procedure should have been exhausted prior to making public issue of teacher negotiations problems.

[Comment:] 14 Mr. Nau has shown a great deal of initiative by developing a competency-based curriculum for his classes for next year. He is continuing on this project hoping to complete it for both 7th and 8th grades by the end of the year.

Summary Comment: Mr. Nau's work has been of a high level considering that this is his first year with the district and his second year of teaching. His efforts in discipline, communication with administration and curriculum have been outstanding. He is respected by students and, I believe, by parents. I have no reservation in recommending Charles for renewal of contract for 1977-78.

S/_____
PRINCIPAL

Nau's reply:

I feel that my professional ethics have been unfairly judged

1 because of a article not having to do with my teaching or
2 involvement with the kids. This is shown by the low marks
3 given on page 4 questions 4, 7, and 13."--MEA Exhibit #17;
Tr58,59.

4 6. MEA's Exhibit #19 is the Teacher of the Year Award which
5 was awarded to Mr. Nau by the Junior High Students. Tr61.

6 7. Mr. Nau testified that he and Mr. Stansfield had had
7 several discussions on individualized contract negotiation.
8 Tr70,71,72,73. The Record states the following in part:

9 LORING: Uhm, during this period, when there was problems of
10 getting to the bargaining table, did you have any discussions
11 with, uh, Mr. Stansfield regarding teacher organizations?
12 NAU: Uh, well, uh, there were many times when I'd stopped at
13 Leon's [Stansfield] office, you know. Uh, Harold [Gray] was
14 gone an awful lot of time and Leon was kind of an intermediary
15 there it seemed like between the Board. He knew what was
16 going on for them and I knew what was going on for myself, uh,
17 and my negotiating team and the teachers; and we had discussed
18 many times what the problems were and how we could get the
19 problems out of the way and continue down the line to, uh, get
20 the ball rolling as far as negotiations. And, uh, Leon seemed
21 to - felt in many occasions the fact that if we went on an
22 individualized basis with the exclusion of MEA and went on our
23 own merits and everything, that would be the route to go
24 because there would be no hassel as far as, uh, evaluation or
25 any other complaints lodged against the School Board because
26 that was the MEA doing that and if we disaffiliated ourselves
27 individually from MEA then there would be no complaint with
28 the School Board negotiating with us singly.

29 LORING: You started by saying that Leon seemed to feel this.
30 Is this what he said?

31 NAU: Yeah, well, you know, his feelings on the subject is
32 what he had mentioned.

33 LORING: What his verbalized feelings were because none of us
34 know what was in his head?

35 NAU: Yeah, yeah..." Tr57 Line 19 to Tr58 Line 17.

36 Mr. Stansfield replied:

37 RICE: What is your comment about the statements that you
38 appear to be urging that individual negotiation was the way to
39 go, what did you mean by that?

40 STANSFIELD: Uh, I don't, I never made any comments to any
41 staff member, including Mr. Nau or Mrs. Volk, that I thought
42 that they should have individual negotiations. I never said
43 this. Uh, the one thing I did, which I believe has confused a
44 number of teachers and I think it's of interest to note, that
45 many teachers have, on our staff, have only taught here and
46 they're not familiar with procedures used in other places. But
47 last year, I discovered after I came here that our teachers,
48 as well as not having a master contract, neither did they have
49 an individual contract, which is required by law. And late in
50 the spring, uh, after teachers had been notified of renewal or
51 non-renewal, uh, I was able to persuade the School Board that
52 an individual contract was required by law and we actually
53 issued individual contracts which would be for those teachers
54 which were renewed. Now, I believe that if they thought that

1 I had urged them to do individual negotiations, that they were
2 confusing that idea with the idea that they needed to have an
individual teaching contract as required by law.

3 RICE: So that was the basis of your comment about individual
involvement [sic]?

4 STANSFIELD: Yes, I never used the word individually negotiate
or I never discussed with any staff member, including these
5 two people, the idea that I thought that they should negotiate
individually with the board.

6 RICE: Okay.

7 STANSFIELD: Because I know that the law requires something
else, at least when there's an organization involved..."

8 Tr93 Line 23 to Tr 94 Line 24.

9 Mr. Nau's rebuttal testimony is as follows:

10 "LORING: Uh, you were here when Mr. Stansfield testified that
the only conversation he had had about NAPE was one conversa-
11 tion with Carolyn Velk. Uh, your original testimony, uh, was
to the contrary. Do you want to revise your testimony?

12 NAU: Well, at the, at the, time I testified previously, I'd
mentioned that he and I had discussed this at many times, uh,
and at great length during some of the time. He, uh, to the
13 contrary mentioned that it was due to the fact that all
teachers had to have an individual contract by state law.
Well, what I was talking about was the meetings I had with him
14 in his office and the discussions that took place during the
months of February and March before the non-renewal. Now the
15 individualized contracts that he mentioned didn't come about
or take place until the end of May so what I had talked to him
16 about was, uh, how we could get the ball rolling at that
particular time last winter and how we could do it and he'd
17 mentioned the fact well the only way to really get around this
evaluation, uh, was to go individualized because the evaluation
18 was the holdup and the Board was under no obligation to negotiate
with the ULP being, uh, in the courts. And so consequently,
19 he mentioned the individualized way was the only way to go."
Tr119(2-22).

20 8. Nau was a primary contact for MEA's Uniserv Director,
21 Sean Matthews. Tr88-89.

22 9. There was no dissatisfaction with Mr. Nau's teaching.
23 The Record sets forth the following in part:

24 "LORING: Had there been dissatisfaction with Mr. Nau, uh,
teaching and where he, uh, the classes that he was teaching?

25 DENNY: No, not - I don't think so. Tr112(11-13).

26 10. Mr. Nau has been unable to find satisfactory employment.
27 Tr62,71.

28 III. DISCUSSION

29 I would like to start by comparing the National Labor Relations
30 Act (NLRA) with the Montana Collective Bargaining Act for Public
31 Employees.
32

1
2 Rights of the Employees
3 NLRA Act

4 "Sec. 7. Employees shall have
5 the right to selforganization
6 form, join, or assist labor
7 organizations, to bargain col-
8 lectively through representa-
9 tives of their own choosing,
10 and to engage in other con-
11 certed activities for the pur-
12 pose of collective bargaining
13 or other mutual aid or protec-
14 tion, and shall also have the
15 right to refrain from any or
16 all of such activities except
17 to the extent that such right
18 may be affected by an agreement
19 requiring membership in a labor
20 organization as a condition of
21 employment as authorized in
22 section 8 (a) (3). [49 Stat.
23 452, 29 U.S. Code, Sec. 157, as
24 amended by P.L. 101, 80th cong.,
25 1st Sess.]

"59-1603. Employees' right to
join or form labor organization to
and engage in collective bargaining
activities. (1) Public employees
shall have, and shall be protected
in the exercise of, the right of
self-organization, to form, join
or assist any labor organization,
to bargain collectively through
representatives of their own
choosing on questions of wages,
hours, fringe benefits, and other
conditions of employment and to
engage in other concerted activi-
ties for the purpose of collective
bargaining or other mutual aid or
protection, free from interference
restraint or coercion.

26 Unfair Labor Practices
27 NLRA Act

28 Sec. 8. (a) It shall be an
29 unfair practice for an employer
30 (1) To interfere with, restrain,
31 or coerce employees in the exer-
32 cise of the rights guaranteed in
section 7. [49 Stat. 452, 29 U.
S. Code, Sec. 158 (1).]
... (3) By discrimination in
regard to hire or tenure of
employment or any term or con-
dition of employment to encour-
age or discourage membership in
any labor organization:..."

59-1605. Unfair labor practices
of employer or labor organization.
(1) It is an unfair labor practice
for a public employer to: (a)
interfere with, restrain, or coerce
employees in the exercise of the
rights guaranteed in section 59-
1603 of this act; (c) discriminate
in regard to hire or tenure of
employment or any term or condition
of employment to encourage or dis-
courage membership in any labor
organization;..."

I think the above federal and state statutes are comparable.
Therefore, I will look at the NLRB case law for a reasonable
application of Montana's collective bargaining statute. This
principle was approved in State Department of Highways vs Public
Employees Craft Council, (op. cit. page 2)

A. The First Test

The Commerce Clearing House, Inc., Labor Law Course, ¶ 1572
(1972) sets forth the following test (in part):

1
2 "In determining whether the employer has violated the Act
3 [NLRA], the Board [National Labor Relations Board (NLRB)]
4 endeavors to determine the motivating cause of the action
5 alleged to be discriminatory. In a great many instances, the
6 employer asserts that legitimate reasons existed for his
7 action. Improper motive distinguishes an unlawful discharge
8 from a lawful discharge. NLRB v. Continental Pipe Line Company
9 161 F. (2d) 302; NLRB v. Robbins Tire & Rubber Co. 161 F. (2d)
10 798. In determining whether the action was discriminatory or
11 justified on the grounds assigned by the employer, the Board
12 gives consideration to the following factors:

- 13 (1) The entire background, including anti-union activity;
- 14 (2) Percentage of union members or leaders among the
15 employees affected;
- 16 (3) Admissions;
- 17 (4) Statement by the discharging supervisor tending to
18 show his state of mind;
- 19 (5) Answers to complaints which do not deny the discrimi-
20 nation;
- 21 (6) Failure to explain a discharge at the hearing;
- 22 (7) Failure to call as witness management representative
23 having personal knowledge of the reason assigned;
- 24 (8) Effect of discharge on unionization--whether or not
25 the leading organizers and officials of the union
26 have been eliminated;
- 27 (9) Espionage directed toward identity of union members;
- 28 (10) Extent to which the discharged employee engaged in
29 union activity;
- 30 (11) Relation in point of time of employer's action to
31 employee's union affiliation or activity;
- 32 (12) Disparate treatment of competing unions.

In addition, the Board considers the affected employee's
service record, his efficiency, and whether or not the dis-
charge was peremptory and without warning.

Applying this test to Velk and Nau, I find:

- (1) The entire background, including anti-union activity:

The highest anti-union background was committed by the School Board
when they removed Sean Matthews, MEA's 'union representative,' from
the meeting of March 14, 1977. Tr15,56,84,85,89,90. Even after
complaints from Nau and Velk and the reassurance from Gray that
there would not be a news article, the School Board and/or Admin-
istration provided information for an anti-MEA news article.
Tr46,48,49,64,65.

This unfair labor practice appears to be a non-stop continu-
ation of ULP#13-76. This is best demonstrated by Mr. Gray when he
wrote ...the RBEA has three choices:

- (a) Join some other union,
- (b) Drop ULP#13-76, or
- (c) Negotiate individually.

1 and when Dorothy Small stated...if the teachers did not choose one
2 of the above, the Board would continue to fight the charges in
3 ULP#13-76 all the way to the Supreme Court, if necessary. MEA
4 Exhibits #2 and #3.

5 (2) The percentage of union members or leaders among the
6 employees affected: The RBEA's negotiating team primarily consisted
7 of Velk, Nau, Viethenheimer, and Ford. Fifty percent of the nego-
8 tiating team was not rehired--the president and the chief negotiator.
9 Tr4,5,26,28,42.

10 (3) Admissions: None

11 (4) Statement by the discharging supervisor tending to show
12 his state of mind: No statements were made by the School Board or
13 Administration. The activities of the School Board and the com-
14 mittee were: (a) Mr. Denny quizzed the teachers about why they
15 wanted MEA and Sean Matthews, (b) A letter to the Indian teachers
16 requesting they negotiate, (c) Minnie Watson's and Harold Gray's
17 request to be removed from the School Board's negotiating team, and
18 (d) The prohibition of labor unions on the Rocky Boy Reservation by
19 a Tribal Resolution. Tr16,17,33,103. MEA Exhibit #14, School
20 District Exhibit #B.

21 (5) Answers to complaints which do not deny the discrimina-
22 tion: None.

23 (6) Failure to explain a discharge at the hearing: Mr. Denny
24 and Mr. Stensfield never did explain why the teachers were not
25 rehired. When they were asked if the teachers were not rehired
26 because of union activities or unionrelated activities, they
27 replied "No." Tr78,104. When Mr. Denny was asked if the teachers
28 were unsatisfactory or problem teachers, Mr. Denny replied "No."
29 Tr112,113.

30 (7) Failure to call as witness management representative
31 having personal knowledge of the reason assigned: The School Board
32

1 called two witnesses--neither one explained why Velk and Nau were not
2 rehired.

3 (8) Effect of discharge on unionization--whether or not the
4 leading organizers and officials of the union have been eliminated:
5 RBEA never finished negotiating the contract for the 1977-78 school
6 year. The teachers at Rocky Boy currently do not have a master
7 labor agreement. Tr5,24. I believe if the School Board had voted
8 to renew President Velk and Chief Negotiator Nau, the RBEA would
9 have had a Master Labor Agreement. Velk and Nau were Mr. Matthew's
10 and MEA's primary contacts at Rocky Boy. Tr88,89. With Nau and
11 Velk being the primary contacts for the parent labor organization,
12 the leadership at Rocky Boy was effectively eliminated when they
13 were fired.

14 (9) Espionage directed toward identity of union members:

15 None.

16 (10) Extent to which the discharged employee engaged in union
17 activities: Chief Negotiator Nau and President Velk were very
18 active in the RBEA. Mr. Nau arranged some of the negotiations
19 meetings and met with Dorothy Small and Mr. Crain to object to the
20 proposed news article. Mr. Gray raised Cain with Nau when the
21 Letter to the Editor appeared. Ms. Velk and Mr. Nau wrote to Mr.
22 Gray on April 1, 1977 to request additional negotiations. Velk
23 wrote to Mitchell in regards to Gray's activities and Mitchell
24 wrote back. Tr31,42,48,49,50,65, 104. MEA Exhibits #4, #5, and
25 #26.

26 (11) Relation in point of time of employer's action to employ-
27 ee's union affiliation or activity: The RBEA activities consisted
28 of pushing the School District to negotiate a Master Labor Agreement.
29 I believe the School District had only one way to slow down RBEA's
30 push, i.e., Velk's and Nau's push; that is not to rehire Velk and
31 Nau.

1 (12) Disparate treatment of competing unions: I give no
2 weight to Stansfield's answer about individualized contracts.
3 Tr94,119. Mr. Stansfield's NAPE and individualized contract
4 negotiations and Mr. Gray's three choices--(a) join some other
5 union, (b) drop the ULP, or (c) negotiate individually--all add up
6 to very poor treatment of MEA in comparison to management's ideal
7 union.

8 Looking at MEA's Exhibits #13 and #17 (Velk's and Nau's evalu-
9 ations), I find Excellent first evaluations and Good second evaluations.
10 The first evaluation was before Nau's and Velk's strong involvement
11 in RBEA's contract negotiations. If I remove all laborrelated
12 activities from the second evaluations, I once again find Excellent
13 evaluations.

14 B. A Second Test

15 The U.S. Supreme Court in NLRB vs Great Dane Trailers, Inc.
16 (1967) 388 U.S.26, 65 LRRM 2465 at 2469 set forth the following
17 principles in part:

18 "From this review of our recent decisions, several principles
19 of controlling importance here can be distilled. First, if it
20 can reasonably be concluded that the employer's discriminatory
21 conduct was 'inherently destructive' of important employee
22 rights, no proof of an antiunion motivation is needed and the
23 Board [NLRB] can find an unfair labor practice even if the
24 employer introduces evidence that the conduct was motivated by
25 business considerations. Second, if the adverse effect of the
26 discriminatory conduct on employee rights is 'comparatively
27 slight,' an antiunion motivation must be proved to sustain the
28 charge if the employer has come forward with evidence of
29 legitimate and substantial business justifications for the
30 conduct. Thus, in either situation, once it has been proved
31 that the employer engaged in discriminatory conduct which
32 could have adversely affected employee rights to some extent,
the burden is upon the employer to establish that it was
motivated by legitimate objectives since proof of motivation
is most accessible to him."

33 In the same case at 65 LRRM 2469, the U.S. Supreme Court applied
the above principles as follows in part:

34 "Applying the principles to this case then, it is not neces-
35 sary for us to decide the degree to which the challenged
36 conduct might have affected employee rights. As the Court of
37 Appeals correctly noted, the company came forward with no
38 evidence of legitimate motives for its discriminatory conduct.

1 363 F.2d, at 134, 62 LRRM 2456. The company simply did not
2 meet the burden of proof, and the court of Appeals misconstrued
3 the function of judicial review when it proceeded nonetheless
4 to speculate upon what might have motivated the company.
5 Since discriminatory conduct carrying a potential for adverse
6 effect upon employee rights was proved and no evidence of a
7 proper motivation appeared in the record, the Board's con-
8 clusions were supported by substantial evidence, Universal
9 Camera Corp. v. Labor Board, 340 U.S. 474, 27 LRRM 2373 (1951),
10 and should have been sustained."

11 The facts in this case are:

12 a. the RBEA was trying to negotiate a Master Labor Agreement
13 for the 1976-77 School Year. The master contract was never com-
14 pleted. There is no current labor agreement at Rocky Boy for the
15 teachers. Tr5,24.

16 b. on April 12, 1977, the School Board's Chief Negotiator and
17 one member of the Negotiating team asked to be relieved of their
18 negotiation duties.

19 c. on April 12, 1977, the School Board voted to inform the
20 Indian teachers that the School Board would negotiate with them.

21 d. on April 12, 1977, the School Board voted not to rehire
22 RBEA's President and RBEA's Chief Negotiator--Velk and Nau.

23 e. the School Board repeatedly refused to negotiate because of
24 the Unfair Labor Practices Proposed Order and the Tribal Resolution.

25 I judge the above actions of the School Board as a calculated
26 plan not to negotiate with RBEA. I further judge the calculated
27 plan of the School Board to be inherently destructive to the employees'
28 rights to negotiate.

29 At the same time, I find the School Board offered no business
30 reason for the non rehiring of Velk and Nau.

31 C. A Third Test

32 In ULP28-76, Billings Education Association vs Billings School
33 District, the Montana School Board Association's attorney argued
34 before the Board of Personnel Appeals that Mt. Healthy should be
35 applied in non rehire cases.. The Mt. Healthy case involves, among
36 other items, the exercise of a constitutionally protected right of

1 the First and Fourteenth Amendments.

2 The U.S. Supreme Court in Mt. Healthy City School District
3 Board of Education vs Fred Doyle, No. 751278, 45LW4079, Bureau of
4 National Affairs 691:24(1-17-77) at 691:27, set forth the following
5 in part:

6 "A rule of causation which focuses solely on whether protected
7 conduct played a part, 'substantial' or otherwise, in a decision
8 not to rehire, could place an employee in a better position as
9 a result of the exercise of constitutionally protected conduct
10 than he would have occupied had he done nothing. The dif-
11 ficulty with the rule enunciated by the District Court is that
12 it would require reinstatement in cases where a dramatic and
13 perhaps abrasive incident is inevitably on the minds of those
14 responsible for the decision to rehire, and does indeed play a
15 part in that decision--even if the same decision would have
16 been reached had the incident not occurred. The constitutional
17 principle at stake is sufficiently vindicated if such an
18 employee is placed in no worse a position than if he had not
19 engaged in the conduct. A borderline or marginal candidate
20 should not have the employment question resolved against him
21 because of constitutionally protected conduct. But that same
22 candidate ought not to be able, by engaging in such conduct,
23 to prevent his employer from assessing his performance record
24 and reaching a decision not to rehire on the basis of that
25 record, simply because the protected conduct makes the employer
26 more certain of the correctness of its decision."

27 The U.S. Supreme Court applied this rule as follows:

28 "Initially, in this case, the burden was properly placed upon
29 respondent to show that his conduct was constitutionally
30 protected, and that this conduct as a 'substantial factor'--or,
31 to put it in other words, that it was a 'motivating factor' in
32 the Board's decision not to rehire him. Respondent having
33 carried that burden, however, the District Court should have
34 gone on to determine whether the Board had shown by a prepon-
35 derance of the evidence that it would have reached the same
36 decision as to respondent's reemployment even in the absence
37 of the protected conduct."

38 The complainant in this case did show that the labor conduct
39 of Velk and Nau--negotiating a labor contract--is a protected
40 activity. The complainant went on to show that Velk and Nau were
41 good teachers. Tr112,113. MEA Exhibits #13, #17. Therefore, Velk
42 and Nau must not have been rehired because they were the president
43 and chief negotiator for RBEA. If I remove all labor activities
44 from the Record in this case, the School Board fails to demonstrate
45 that they would have reached the same decision in the absence of
46 such protected labor activities.

1 In review of prior Board of Personnel Appeals' cases, I find
2 the above arguments compatible with Frazer Education Association
3 vs Valley County School District No 2 & 2B, ULP1576 and Teamsters vs
4 Havalli County Commissioners ULP 473.

5 IV. CONCLUSIONS OF LAW

6 The Rocky Boy School District #37 did commit an unfair labor
7 practice by the non-renewal of Velk's and Nau's teaching contracts
8 for the 1977-78 school year. The School did violate Section
9 59-1605(1)(a):

10 "...interfere with, restrain, or coerce employees in the
11 exercise of the rights guaranteed in section 59-1603 of this
act;..."

12 and Section 59-1605(1)(c):

13 "...discriminate in regard to hire or tenure of employment or
14 any term or condition of employment to encourage or discourage
membership in any labor organization;..."

15 V. REMEDIES

16 A. General

17 The NLRA and Montana's Collective Bargaining Act for Public
18 Employees provides for the following remedies:

19 NLRA

The Act

20 Sec.10. (c) The testimony taken
21 by such member, agent, or agency
22 or the Board shall be reduced to
writing and filed with the Board.
23 Thereafter, in its discretion,
the Board upon notice may take
24 further testimony or hear argu-
ment. If upon the preponderance
25 of the testimony taken the Board
shall be of the opinion that any
person named in the complaint
26 has engaged in or is engaging in
any such unfair labor practice,
then the Board shall state its
findings of fact and shall issue
27 and cause to be served on such
person an order requiring such
28 person to cease and desist from
such unfair labor practice, and
29 to take such affirmative action
including reinstatement of
30 employees with or without back
pay, as will effectuate the
31 policies of this Act; Provided,
32 That where an order directs
reinstatement of an employee,

59-1607. (2) The testimony taken
by the board or its agent shall be
reduced to writing and filed with
the board. Thereafter in its dis-
cretion the board upon notice may
take further testimony or hear
argument. If upon the preponder-
ance of the testimony taken the
board is of the opinion that any
person named in the complaint has
engaged in or is engaging in an
unfair labor practice, it shall
state its findings of fact and
shall issue and cause to be served
on the person an order requiring
him to cease and desist from the
unfair labor practice, and to take
such affirmative action including
reinstatement of employees with or
without back pay, as will effectuate
the policies of this act. The
order may further require the
person to make reports from time
to time showing the extent to which
he has complied with the order."

1 back pay may be required of the
2 employer or labor organization,
3 as the case may be, responsible
4 for the discrimination suffered
5 by him:..."

6 I will once again look to the NLRB for guidance in applying
7 Montana's Statute. From the Montana Act and the case at hand, I
8 believe the minimum I should do is to require the School Board to
9 reinstate Nau and Velk. At the same time, I must look at back pay
10 for the loss of wages, loss of benefits, moving expenses incurred,
11 and interest.

12 B. Reemployment Contracts or Letters of Reemployment

13 To make Velk's career whole, I will order that this reemployment
14 contract be considered her fourth consecutive contract when calcu-
15 lating salary and benefits. When offering Nau this reemployment
16 contract, the contract is to be considered his third consecutive
17 contract when addressing the questions of wages and benefits. Each
18 contract offered Velk and Nau after the reemployment contract is to
19 be calculated by adding one year experience to each contract,
20 respectively.

21 The School Board is to offer Velk and Nau the reemployment
22 contracts for the 1978-79 school year in April of 1978 in the same
23 manner as the other contracts are offered to the other teachers.
24 Velk and Nau are to return their reemployment contracts in the same
25 manner as the other teachers return their renewal contracts.

26 C. Duty to Seek Other Employment

27 If an employee is not rehired because of his union activities
28 and the employee is asking for back pay, the employee must make a
29 reasonable effort to seek new employment. Phelps Dodge Corp.
30 vs NLRB (1941), 313 U.S. 177, 8 LRRM 430. The NLRB (and this
31 Board) considers each case of back pay with respect to the indi-
32 viduals involved and with respect to the record as a whole. NLRB vs
Rice Lake Creamery (1972) 62LRRM 2132.

1 Because the Record states only that Nau has been unable to
2 find satisfactory employment, I cannot determine that Nau has made
3 a reasonable effort to seek new employment as stated above. Did
4 Mr. Nau make a reasonable effort to seek employment? I believe
5 this question and other questions can best be answered by Nau. I
6 will attach an affidavit to this Order and order that Nau complete
7 the affidavit within 15 calendar days after receipt of this Order.
8 Within 20 calendar days after the receipt of Nau's affidavit, all
9 attorneys of record may address any matter raised by the affidavit
10 in a brief which is to be mailed to all parties of record. After a
11 review of Nau's affidavit and the attorneys' briefs, if appropriate,
12 I will then order back pay, benefits and expenses.

13 Because Velk is employed, to make her whole, I believe if the
14 pay and benefits at her present employment are less than what she
15 would have received at Rocky Boy, Rocky Boy is liable for the
16 difference.

17 D. Computing Back Pay

18 The NLRB in the Woolworth Co. case set forth a back pay prin-
19 ciple. The U.S. Supreme Court in NLRB vs Seven-Up Bottling Co.
20 (1953), 344 U.S. 344, 31 LRRM 2237, upheld the Woolworth pay formula.
21 The Woolworth pay formula basically stops reluctant employers from
22 stalling a reenployment order decreasing the amount of back pay.
23 The reluctant employer would stall reenployment as the aggrieved
24 employee would possibly earn higher wages. The higher wages would
25 then be applied to the back pay award. The NLRB set forth the
26 following in the Woolworth Co. case (1950) 90 NLRB No. 41, 26 LHRM
27 1185 and 1186:

28 "The deleterious effect upon the companion remedy of reinstatement
29 has been twofold. Some employers, on the one hand, have
30 deliberately refrained from offering reinstatement, knowing
31 that the greater the delay the greater would be the reduction
32 in back pay liability. Thus, a recalcitrant employer may
continue to profit by excluding union adherents from his
enterprise. Employees on the other hand, faced with the
prospect of steadily diminishing back pay, have frequently
countered by waiving their right to reinstatement in order to

1 tell the running of back pay and preserve the amount then
2 owing. Upon analysis of a substantial number of cases involving
3 such action, we have found the economic motivation and compulsion
4 upon the employee not difficult to discern. Unemployment or
5 employment at lesser wages may have resulted in the exhaustion
6 of the employee's savings, his incurrence of debts, and even
7 in the deprivation of the necessities of life. Our observation
8 on this score accords with the view of the United States
9 Supreme Court which, in treating this general problem, recognized
10 that the worker is 'not likely to have sufficient resources'
11 to sustain the necessary 'minimum standard of living necessary
12 for health, efficiency, and general well-being' during such
13 periods. The consequent desire for the victim of discrimi-
14 nation to recoup the maximum amount possible in order to
15 offset such losses, even if this must be accomplished at the
16 price of relinquishing the right to be returned to his former
17 position, may readily be anticipated. The Board has viewed
18 these results with concern because we, as well as the courts
19 of review, have long regarded the remedy of reinstatement as
20 one of the most effective measures expressly provided by the
21 Act [National Labor Relations Act] for expunging the effects
22 of unfair labor practices and maintaining industrial peace.

23 "The public interest in discouraging obstacles to industrial
24 peace requires that we seek to bring about, in unfair labor
25 practice cases, 'a restoration of the situation, as nearly as
26 possible, to that which would have obtained but for the illegal
27 discrimination. In order that this end may be effectively
28 accomplished through the medium of reinstatement coupled with
29 back pay, we shall order, in the case before us and in future
30 cases, that the loss of pay be computed on the basis of each
31 separate calendar quarter or portion thereof during the period
32 from the Respondent's discriminatory action to the date of a
33 proper offer of reinstatement. The quarterly periods, hereinafter
34 called 'quarters,' shall begin with the first day of
35 January, April, July, and October. Loss of pay shall be
36 determined by deducting from a sum equal to that which...
37 [employee] would normally have earned for each such quarter or
38 portion thereof, her net earnings, if any, in other employment
39 during that period. Earnings in one particular quarter shall
40 have no effect upon the back pay liability for any other
41 quarter."

42 I hereby adopt the above logic and formula in computing Velk's
43 and Nau's back pay, benefits and expenses.

44 Due to the fact that teachers teach for a nine-month school
45 year, Nau's back pay, if ordered, calculation will end at the end
46 of the school year in the year that Rocky Boy School District
47 offers Nau a contract for reemployment. Because Velk is now teaching
48 at the Big Sandy school system for the 1977-78 school year and not
49 wanting to inflict any harm on Big Sandy School System, Velk's back
50 pay calculations will end at the end of the school year in the year
51 that Rocky Boy School District offers Velk a contract for reemploy-
52 ment.

1 Because there is no contractually determined salary schedule
2 (Tr24), I will direct the parties to use the following formula to
3 calculate Velk's and Nau's back pay for each quarter:

4 VELK: The average quarterly base salary for all full-time
5 teachers, kindergarten through eighth grade with two, three
6 and four years teaching experience at Rocky Boy or teachers
7 assigned at that level at Rocky Boy, less Velk's quarterly
8 salary from Big Sandy, less any additional income.

9 NAU, if back pay is so ordered: The average quarterly base
10 salary for all fulltime teachers, kindergarten through eighth
11 grade with one, two and three years teaching experience at
12 Rocky Boy or teachers assigned at that level at Rocky Boy,
13 less any quarterly salary earned.

14 Unemployment compensation income is not to be considered as income.

15 NLRB v. Cullett Gin Co. (1951) 340 U.S. 361, 27LRM 2230.

16 The Record shows no other benefits--insurance, teacher retire-
17 ment, Social Security--that Velk and Nau may have lost. I grant
18 any difference in any benefit that Velk and, if applicable, Nau may
19 have lost to be paid by the School District to the respective
20 agency with interest.

21 In order to accomodate this Order, the parties are directed to
22 exchange and provide this Board a copy of all calculations, averages,
23 listing of wages, quarterly earnings, lost benefits and other
24 needed items within 30 days of the last day of school in the year
25 that the School District offers Velk and Nau reemployment.

26 E. Moving Expenses

27 The NLRB has ruled that if any fees or extra expenses are
28 accrued in obtaining or retaining new employment, the expenses are
29 a liability to the employer. Harvest Queen Mill & Elevator Co.
30 vs NLRB (1950) 26 LRM 1189 and Local 249 International Brotherhood
31 of Teamsters vs NLRB (1956) 38 LRM 1254. In light of the above,
32 I grant Velk's prayer for \$1100 in moving expenses (Tr24) plus a
reasonable amount for moving back to Havre, Montana if she accepts
reemployment at Rocky Boy.

F. Interest

The NLRB in 1962 adopted a policy of adding 6 percent interest to their back pay orders. Reserve Supply Corp. vs NLRB (1963) 317 f2d 785, 53 LRRM 2374 and Aztec Ceramics Co. vs NLRB (1963) 53 LRRM 2480. I hereby grant 6 percent annual interest to be added to all awarded back pay, benefits and expenses.

VI. PROPOSED ORDER

I. Rocky Boy School District #87 is ordered to cease and desist from:

A. interfering with, restraining, or coercing employees in exercising the rights guaranteed in section 591603 and

B. discriminating in regard to hiring or tenure of employment or any terms or conditions of employment to encourage or discourage membership in Rocky Boy Education Association and any other labor organization.

Rocky Boy School District #87 is ordered to:

A. offer reemployment to Carolyn Velk in the same position or equivalent position for the 197879 school year as directed in this Order,

B. make Carolyn Velk whole in regards to lost wages, lost benefits, accrued expenses and interest in full compliance with this Order,

C. provide all needed information to all parties to effectively execute this order and,

D. offer Charles Nau reemployment to the same position or equivalent position for the 197879 school year as directed in this Order.

II. Charles Nau and Carolyn Velk are ordered to provide all needed information to all parties to effectively execute this order.

1 Charles Nau is further ordered to complete and mail to all
2 parties the attached affidavit within 15 calendar days after the
3 receipt of this order.

4 III. After reviewing Nau's affidavit and attorneys' briefs,
5 the Hearings Examiner in this matter will rule on the question of
6 Charles Nau's back pay.

7 DATED the 10TH day of March, 1978

8
9 BOARD OF PERSONNEL APPEALS

10 By R. C. Hoge
11 Hearings Examiner

12 NOTE: All parties have 20 calendar days to file written exceptions
13 to this Proposed Order. If no written exceptions are received by
14 this Board, the Proposed Order becomes a Final Order of the Board.
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32